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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1009

HERBERT LOYD LINDAUER,
Petitioner,

VERSUS

The OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH and HARVEY EVEREST,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March, 1972

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioner seeks to obtain review of a decision of the United States Court of Appeals for the Tenth Circuit sustaining the judgment of the United States District Court for the Western District of Oklahoma.

This action was instituted on May 8, 1970, by complaint asserting the Oklahoma Urban Redevelopment Law, 11 Okla. Stat. §§1601-1620, to be unconstitutional and seeking the appointment of a three-judge court. The District Court denied the application for a three-judge court and dismissed the action for failure to state a claim upon which relief might be granted. See Memorandum Opinion (W.D. Okla., Civil No. 70-244), Appendix B, Brief of

Petitioner. The Court of Appeals affirmed this decision on the ground that no substantial federal question was presented. See Opinion (10th Cir., No. 71-1045), Appendix A, Brief of Petitioner.

The provisions of the Urban Redevelopment Law apply to all incorporated cities in Oklahoma in excess of 100,000 population. 11 Okla. Stat. §1602. The powers conferred by this legislation may be invoked by resolution of the local governing body. 11 Okla. Stat. §1607.

Subsequently, other acts were passed by the Oklahoma Legislature applying to cities having populations between 10,000 and 100,000, and cities with population of no more than 10,000, which acts were identical to the Urban Redevelopment Law except that an additional requirement for invoking powers under the later acts was provided, which reads as follows:

> "No incorporated city shall exercise the authority granted by this Act until a majority of the qualified property taxpaying voters thereof who vote at an election to be held for that purpose shall have approved the same." 11 Okla. Stat. §1657 and 11 Okla. Stat. §1707.

The first enactment, the Urban Redevelopment Law, codified as 11 Okla. Stat. §§1601-1620, was adopted as an emergency measure and became effective on April 7, 1959 (Oklahoma Session Laws, 1959, Chapter 38, pp. 61-77).

Next, the Legislature enacted the Urban Redevelopment Act, codified as 11 Okla. Stat. §§1651-1670 (Oklahoma Session Laws, 1959, Chapter 36, pp. 43-60), applicable to cities between 10,000 and 100,000 population. This Act was

not enacted as an emergency measure and did not become effective until October 1, 1959.

The third urban renewal law, applicable to cities of 10,000 population or less, was passed some two years later and is known as the Urban Redevelopment Act of 1961. This legislation is codified as 11 Okla. Stat. §§1701-1718.

Only the Urban Redevelopment Law, applicable to cities in excess of 100,000 population and the first of the three schemes of legislation, is challenged in this action. The subsequent legislation permitting redevelopment programs in smaller cities is not in issue.

SUMMARY OF ARGUMENT

Petitioner asserts entitlement to a review by a three-judge court on the ground that the complaint alleges a substantial federal question. But where the petitioner's allegations are patently without merit, there is no issue warranting review by a three-judge court and the complaint should be dismissed. The allegation, that the Urban Redevelopment Law, which applies to cities in excess of 100,000 population, violates the "equal protection" clause of the Fourteenth Amendment, poses no substantial federal question.

The Urban Redevelopment Law was the first of three complete and separate statutory schemes to be enacted by the State Legislature. The legislative objective of urban renewal is a sound public purpose. *Berman* v. *Parker*, 348 U.S. 26. The legitimacy of the legislative purpose apparently is not now questioned by petitioner. The petitioner does contend that this law is unconstitutional in that it does

not give him a right to vote on its implementation; whereas, subsequent acts pertaining to smaller communities require voter approval.

This case involves only two issues. First, is the population classification adopted by the Legislature to deal with problems of urban blight reasonable and valid. Second, are all persons within this classification treated fairly and without unlawful discrimination.

That the Legislature chose first to address itself to the problems of the larger cities (those of more than 100,000 population) does not pose an issue for resolution by this Court. It is clear that blight and deterioration exist in the larger cities, while it may or may not be present in smaller municipalities. Thus, neither the Legislature's determination to use the police power to attack the problems of the larger cities *first* nor its decision regarding implementation (which was entrusted to the governing bodies of the cities) lacks rational justification. Consequently, there is no real issue as to the constitutionality of the population classification.

It is further readily apparent from examination of the Urban Redevelopment Law that it applies equally to all persons coming within the classification. There is no requirement for a popular vote to implement the law, but all citizens have an equal voice, although indirect, in that they select the local governing body which makes the decision regarding implementation of this legislation.

Contrary to petitioner's assertion, no question is here presented of denial of the *right* of franchise. It is a legislative prerogative to determine the means and extent of

implementing the police power to deal with problems affecting the public welfare. There is no inherent *right* to vote on such legislative determinations. The Urban Redevelopment Law treats all persons falling within its purview equally and fairly. It does not disenfranchise anyone.

Subsequent passage of the acts permitting small communities to exercise redevelopment powers upon affirmative majority vote of qualified voters does not affect the validity of the earlier Urban Redevelopment Law. The reasonableness of the population classification is not disturbed since these later acts are separate and complete schemes of legislation, intended to treat the possible presence of blight in the smaller towns. The validity of the two later acts is not, and cannot be, challenged by the petitioner in this case.

The foregoing conclusions have been confirmed in three court decisions that foreclose any serious inquiry into the constitutionality of this legislation. State court decisions, squarely in point and persuasive in their reasoning, have unequivocally rejected the contention of unlawful discrimination where it is predicated on the fact that such legislation does not extend the right to vote to citizens in large cities. *Isaacs* v. *Oklahoma City*, 437 P.2d 229 (Okla. 1966), *cert. den.* 389 U.S. 825 (involving the identical legislation and the exact challenge presented in this case); *City of Kansas City* v. *Robb*, 183 Kan. 834, 332 P.2d 520 (1958). This Court has also spoken with favor about a similar legislative scheme. *Kramer* v. *Union Free School District*, Note 7, 395 U.S. 621.

It follows that no real Fourteenth Amendment question is presented for determination, and that there is no issue warranting review by this Court.

REASONS FOR DENYING THE WRIT

I

PETITIONER'S CHALLENGE OF THE URBAN REDEVELOPMENT LAW OF OKLAHOMA, WHICH IS APPLICABLE ONLY TO CITIES OF 100,000 POPULATION, PRESENTS NO SUBSTANTIAL "EQUAL PROTECTION" ISSUE.

The sole challenge in this case is directed to the validity of the Urban Redevelopment Law of Oklahoma, which applies to cities in excess of 100,000 population. Petitioner seeks, by Writ of Certiorari, to obtain review by this Court of issues which have been previously well-considered and are long-settled. A review of the pertinent cases demonstrates that a significant issue of "equal protection" asserted by the petitioner is not present, and there is, therefore, no reason for granting the Writ.

A. There is no basis to convene a three-judge court where a substantial federal question is not presented.

Where the allegations of the complaint are found to be patently without merit, the petitioner has no right to a three-judge panel. *Bailey* v. *Patterson*, 369 U.S. 31; *Phillips* v. *United States*, 312 U.S. 246.

This Court is not limited to the question of proper allegations in the Petition, but may consider authority outside the bill as to whether a substantial federal question has been raised:

> ". . . The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the sub-

ject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' Levering & G. Co. v. Morrin, supra (289 U.S. 103); Hannis Distilling Co. v. Baltimore, 216 U.S. 285; McGilvra v. Ross, 215 U.S. 70." *Ex Parte Poresky*, 290 U.S. 30.

The rules concerning the right to a three-judge court are clearly established and well-known to this Court. The essential consideration in this case is whether the facts presented, as distinguished from the petitioner's personal conclusions, set forth a substantial federal question.

B. The population classification established by the Urban Redevelopment Law is reasonable and is a proper exercise of legislative discretion.

It is now beyond serious dispute that urban renewal or community redevelopment is a valid public purpose, and is, therefore, a proper legislative objective within the purview of the police power of the state. *Berman* v. *Parker*, 348 U.S. 26. In the *Berman* case, the Court applied the general rule that when the legislature has spoken, subject to specific constitutional limitations, public interest has been declared in terms well-nigh conclusive.

Here the purpose of Oklahoma's Urban Redevelopment Law is not dissimilar from that of the urban redevelopment legislation under attack in the *Berman* case. The aim of both is to eliminate slums and blight from urban areas, and prevent further re-occurrence of these conditions. It is incontestable that the effects of these conditions place a heavy burden on the public welfare; therefore, it is clear that the object of this legislation constitutes

a valid public purpose and, as such, is within the scope of the state's police power.

Once the public purpose has been established, the means of executing the project are for the legislature, and it alone, to determine. *Luxton* v. *North River Bridge Co.*, 153 U.S. 525; *Highland* v. *Russell Car & Snow Plow Co.*, 279 U.S. 253. There is no reasonable doubt that the determination of the legislature to classify urban renewal programs on the basis of population is proper. The law in this area is well-settled and free from substantial dispute. It is only legislative classification based on "invidious discrimination" that offends the equal protection guarantee of the Constitution. *Ferguson* v. *Skrupa*, 372 U.S. 726. Where there is any conceivable, rational relationship between the legislative classification and attainment of a proper public purpose, the enactment will be sustained. *Dandridge* v. *Williams*, 397 U.S. 471; *McGowan* v. *Maryland*, 366 U.S. 420; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U.S. 392. In such cases, the burden of showing that the classification adopted by the legislature is unconstitutional rests upon the petitioner. *Morey* v. *Doud*, 354 U.S. 457; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61. Further, this Court has long adhered to the rule that the application of a law to a locality by population classification is not invalid unless the classification is purely arbitrary, oppressive, or capricious. *Hayes* v. *Missouri*, 120 U.S. 68; *Mason* v. *Missouri ex rel. McCaffery*, 179 U.S. 328; *Radice* v. *New York*, 264 U.S. 292.

At the time of its adoption, the Urban Redevelopment Law, applying to cities of over 100,000 population, was the *only* state legislation relating to urban redevelopment. Thus, the primary question presented in this dispute is

whether there was a reasonable basis to support the legislative determination to restrict the application of urban redevelopment to cities exceeding 100,000 population.

It is common knowledge that problems of slums and blight exist in heavily populated metropolitan areas; whereas, such problems may or may not be present in smaller communities. It is equally clear that it is the prerogative and responsibility of the legislature to determine the manner and extent of eliminating social evils through reform measures. In *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 489, the Court stated:

> ". . . The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. State of Texas, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Oregon State Dental Examiners, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. A.F. of L. v. American Sash & Door Co., 335 U.S. 538 . . .".

See to the same effect *Katzenbach* v. *Morgan*, 384 U.S. 641. The Oklahoma Legislature chose to first address itself to those areas of the state most acutely in need of urban redevelopment. It is submitted that this was a reasonable exercise of legislative discretion.

The petitioner has failed to cite a single instance in which the judiciary has rejected a legislative population classification in implementing a program designed to elimi-

nate slums or substandard housing. In fact, such population classifications in furtherance of legislative schemes in urban redevelopment have been universally sustained by the courts. See, *e.g.*, *State ex rel. Fatzer* v. *Urban Renewal Agency of Kansas City*, 179 Kan. 435, 296 P.2d 656 (1956); *Foeller* v. *Housing Authority of Portland*, 198 Ore. 205, 256 P.2d 752 (1953); *Krause* v. *Peoria Housing Authority*, 370 Ill. 356, 19 N.E.2d 193 (1939); *State ex rel. Porterie* v. *Housing Authority of New Orleans*, 190 La. 710, 182 So. 725 (1938).

In sustaining an urban renewal act applying only to cities having a population of more than 75,000, the Kansas Supreme Court in *State ex rel. Fatzer* v. *Urban Renewal Agency of Kansas City, supra*, stated:

> "It is a matter of common knowledge that as cities become more populous they are more subject to slum and blighted areas which are injurious to the public health, safety, morals and welfare of the residents, and in our opinion the population of a city furnished a legitimate ground for a classification and differentiation such as that contained in the act under consideration . . .". 296 P.2d at 659.

And in *Foeller* v. *Housing Authority of Portland, supra*, the court sustained an urban redevelopment law which was restricted to municipalities located in counties having a population of 70,000 or more. Therein, the court said:

> "Difference in the size of cities may call for difference in legislative treatment. Classification of cities upon the basis of their population is not improper if their difference in size has a reasonable bearing upon their needs and the conditions to which a legislator should give heed. (Citations omitted)."

Thus, the determination of the Oklahoma legislature to apply urban redevelopment initially only to cities in excess of 100,000 people represents a reasonable exercise of legislative discretion and *does not* present an "equal protection" issue.

C. All persons within the population classification established by the Urban Redevelopment Law are treated equally and without discrimination.

It is readily apparent from perusal of the Urban Redevelopment Law that all persons are treated equally. There is no requirement for a popular vote, and the decision as to whether to implement the law is made by the local governing body of the city. 11 Okla. Stat. §1607. Thus all persons in such cities have an equal voice, although indirect, through their local governing body in the determination to implement this legislation. This is consistent with the "equal protection" guaranty of the Fourteenth Amendment. Indeed, this precise issue has heretofore been resolved by the Oklahoma Court. *Isaacs* v. *Oklahoma City*, 437 P.2d 229 (Okla. 1966), *cert. den.* 389 U.S. 825.

Contrary to petitioner's assertion, there is no attempt by the Legislature to "take away his right to vote on an important question . . .". (Brief of Petitioner, page 3). There simply is no fundamental *right* of citizens, including petitioner, to vote when the legislature adopts a program designed to deal with questions affecting public welfare. This principle is basic to our representative form of government. See *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162. Indeed, one of the primary responsibilities of the legislature is to determine the manner and extent of exercising the police power to meet such problems.

It is submitted that this is a fundamental and essential rule. In carrying out governmental responsibilities, legislators have traditionally dealt with cities based upon their size and must do so if state and municipal government is to function in an orderly manner. It has never been a requirement that residents of cities be given the right to vote as a prerequisite to implementation of proper legislative programs. See *Waite* v. *Santa Cruz*, 184 U.S. 302; *Lowden* v. *Oklahoma County Excise Board*, 186 Okla. 706, 100 P.2d 448 (1940); *Frazer* v. *Carr*, 360 S.W.2d 449 (Tenn. 1962). As discussed above, the size of cities provides the most logical and natural basis (classification) that the Legislature could have adopted to deal with problems of slum and blight. Certainly the decision of the Legislature to implement this program, without a popular vote, through the governing body of the city (City Council) is a proper choice of legislative means and is not discriminatory to the petitioner.

Petitioner has mistakenly relied upon *Baker* v. *Carr*, 369 U.S. 186, and other cases (not cited) which hold that the *right* to vote may not be unlawfully denied or diluted. The complaint in the *Carr* case alleged that the Apportionment Act of Tennessee effected a gross disproportion of legislative representation to voting population. That case involved the election of representatives to the legislature and was a true voting rights case. As seen above, in the instant case, there is no *right* to vote on the means or manner chosen by the legislature to implement the police power. *A fortiori*, the *Carr* case and similar cases are inapposite.

The petitioner has completely overlooked the fact that the City Council of Oklahoma City, which decides whether to implement urban redevelopment, is properly elected by all residents of the city, and that the petitioner has an equal voice with all other city residents in that election.

The Urban Redevelopment Law does not disenfranchise anyone, but treats all persons encompassed by the classification properly and without discrimination.

II

LEGISLATIVE APPROVAL OF SUBSEQUENT ACTS PERMITTING REDEVELOPMENT PROGRAMS IN SMALLER CITIES ONLY UPON MAJORITY VOTE OF QUALIFIED VOTERS DOES NOT AFFECT THE VALIDITY OF THE EARLIER LAW.

The petitioner asserts that the Urban Redevelopment Law must be considered collectively with subsequent acts extending urban redevelopment to cities of smaller population. See 11 Okla. Stat. §§1651-1670; 11 Okla. Stat. §§ 1701-1718. This subsequent legislation was identical to the Urban Redevelopment Law except that a favorable vote of the qualified voters of the smaller cities was required prior to its implementation. Since the Legislature recognized that the need to eliminate slums or congested housing may not be imperative in smaller municipalities, it included the vote provision as a logical additional requirement for invoking redevelopment powers. Consequently, the fact that smaller communities are required to vote on the necessity for invoking urban renewal powers does not make the Urban Redevelopment Law unreasonable or arbitrary.

The petitioner apparently acknowledges that the Urban Redevelopment Law was valid when passed, but concludes that it somehow became discriminatory to him when the subsequent Urban Redevelopment Acts for smaller cities were adopted. The subsequent acts in no way involve the rights of the petitioner, and neither enhanced nor restricted his voting privilege. It is submitted that the earlier legislation, limited to larger cities and complying with Constitutional guarantees when adopted, cannot become invalid by virtue of later legislation providing a different method for implementation in smaller communities.

The validity of the subsequent legislation is, of course, not an issue in this case and the petitioner, being a resident of Oklahoma City, has no standing to challenge the later enactments which pertain to smaller communities. *Doremus* v. *Board of Education*, 342 U.S. 429; *Tileston* v. *Ullman*, 318 U.S. 44; *McCabe* v. *Atchison T. & S. F. R. Co.*, 235 U.S. 151.

Petitioner's real complaint is that he disagrees with urban redevelopment and does not wish to see it implemented. He has a right to this belief, as do others, but it does not make the Urban Redevelopment Law unconstitutional and it does not give the petitioner an automatic right to vote on this question. His proper remedy would be to attempt to persuade the state legislators to repeal the law or the local governing body (City Council) to rescind its decision to implement the legislation. The petitioner may not like the decision of the City Council, but in a representative form of government, he must abide by it until the decision is changed through proper legislative processes.

We may assume, for the purposes of argument only, as does the petitioner, that the three Oklahoma Statutes pertaining to urban redevelopment were adopted at the same time and form a single legislative scheme. There have been three cases which have considered the precise issue raised by the petitioner, and in each case the legislation has been sustained.

City of Kansas City v. *Robb*, 183 Kan. 834, 332 P.2d 520 (1958), involved the resolution of an issue substantially identical to that presented herein. An act authorizing the issuance of general obligation bonds in support of urban renewal programs was challenged as being unconstitutional. The basis of the challenge was that an election was required prior to issuance of the bonds in cities with less than 125,000 population, but such a bond election was unnecessary, except upon a protest petition, in cities exceeding 125,000 population (two cities in Kansas were in this category: Wichita and Kansas City). In sustaining the act, the court stated:

> ". . . Certainly, the expense and delay of holding bond elections in larger cities and the greater need and urgency for urban renewal action justifies a classification on the basis of population, which, in this case, has a real and substantial relation to the purpose of the statute. It is conceivable that differences of opinion may exist in small cities as to whether slums and blighted areas are present, thus making population a legitimate ground for classification and differentiation with respect to holding elections to issue bonds to undertake and carry out urban renewal projects . . .". 332 P.2d at 523.

The petitioner has ignored the fact that the problem of slum clearance and rehabilitation is of peculiar magni-

tude in larger cities. There is a real and substantial justification for the voting distinction for the cities over and under 100,000 population. The Legislature is aware of the existence of slums in cities over 100,000 and there is no logical basis for an expensive, time-consuming election whereas in smaller cities there may be a reasonable basis for disagreement upon the need for redevelopment and the elections are not as expensive and cumbersome.

The case of *Kramer* v. *Union Free School District*, 395 U.S. 621, is somewhat complex. However, a clear understanding of this case shows that it squarely supports the position of the respondents. The case involved a New York law which provided three methods of school board selection. In large city districts, the school board is appointed by the mayor or city council; in some cities, primarily those with less than 125,000 residents, the school board is elected at a general election of all qualified city voters; and, in other districts, such as the one involved in the *Kramer* case, which are primarily rural and suburban, the school board is elected at an annual meeting which precluded certain qualified electors from participating.

The holding of this Court was that where the legislature has extended the right to vote to certain members of the school district, it is unlawful discrimination to exclude other interested qualified voters from the election. The Court made it very clear there was no requirement that the legislature extend the right to vote for school board members, but if this privilege was extended to a particular district (or classification), it must be extended fairly and without discrimination to all resident voters in that district. In fact, the Court cited with favor the pro-

vision of the New York law which allows the mayor or city council to appoint school board members in cities with population generally in excess of 125,000 persons. In comparing this provision of the New York legislation with the provision which extended the right to vote on a selective basis to persons in smaller school districts, the Court stated:

> "Of course, the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example, if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Cf. NY Educ Law §2553, subd. 2, 4 (1953), as amended (Supp 1968). Each resident's formal influence is perhaps indirect, but it is equal to that of other residents. However, when the school board positions are filled by election and some otherwise qualified city electors are precluded from voting, the excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs . . .". Footnote 7, 395 U.S. at 627.

The *Kramer* case strongly supports the position that the legislature may classify problems on a population basis and may either extend or withhold the voting privilege within those population classifications. If, however, the legislature does extend the right to vote to some persons within a particular population classification, it may not arbitrarily exclude others. The Court was also careful to point out that there is no necessity for exacting judicial examination to find a compelling state interest in legislation where all persons within the classification are on equal footing.

In the instant case, as we have seen, all persons are treated equally within the population classification established by the Urban Redevelopment Law. This situation meets the *Kramer* test that all citizens within the classification have the same equal, although indirect, voice.

Finally, the exact legislation and the identical contentions which are now before the Court have recently been considered and rejected by the Oklahoma Supreme Court. *Isaacs* v. *Oklahoma City, supra*. It was contended in that case that "to deprive the citizens of a city with a population of 100,000 of the right to vote on such an issue is unreasonable and arbitrary and violates the equal protection of the law guaranteed by the Fourteenth Amendment of the U. S. Constitution . . .". The Oklahoma Court rejected this assertion; sustained the population classification, and held the Urban Redevelopment Law to be valid and constitutional. The *Isaacs* case is squarely in point and is compelling precedent in that this Court denied the Petition for Writ of Certiorari in that case. 389 U.S. 825.

In the instant case, the United States Court of Appeals, Tenth Circuit, stated in its opinion:

> ". . . The allegation that the Oklahoma Urban Redevelopment Law violates the equal protection clause of the Fourteenth Amendment poses no substantial federal question. It is clear that blight and deterioration exist in heavily populated areas. The Oklahoma Legislature's decision to use its police power to attack the problems of the larger cities first does not lack rational justification. Consequently, there is no real issue as to the constitutionality of the population classification . . .". Opinion (10th Cir., No. 71-1045), Appendix A, p. iii, Brief of Petitioner.

The petitioner has failed to cite a single case in which population classification or lack of direct voter participation has overturned a legislative program of urban redevelopment. The Oklahoma Urban Redevelopment Law, either viewed alone or considered collectively with other legislation enacted on the subject of urban redevelopment, presents no Fourteenth Amendment issue for determination.

CONCLUSION

The strong rational basis for the Oklahoma Legislature's decision to attack *first* the problems of blight in the larger cities and to entrust the implementation of redevelopment powers to the governing bodies of those cities, precludes any serious question of the validity of the Urban Redevelopment Law.

Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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